

**STATE OF DELAWARE  
PUBLIC EMPLOYMENT RELATIONS BOARD**

<b>EDWARD A JOHNSON, JR.,</b>	)	
<b>Charging Party,</b>	)	
	)	
<b>v.</b>	)	<b><u>ULP No. 05-01-464</u></b>
	)	<b>Probable Cause Determination</b>
<b>STATE OF DELAWARE, DEPT. OF</b>	)	
<b>TRANSPORTATION, DELAWARE</b>	)	
<b>TRANSIT CORPORATION,</b>	)	
<b>Respondent.</b>	)	

**BACKGROUND**

The State of Delaware, Department of Transportation, Delaware Transit Corporation (“State” or “DTC”) is a public employer within the meaning of §1302(p), of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13 (1986).

Edward Johnson, Jr. (“Johnson” or “Charging Party”) was a public employee within the meaning of 19 Del.C. §1302(o) of the PERA who was employed by DTC as a Fixed Route Driver at the time of his resignation and subsequent termination on or about August 20, 2004.

At all times relevant to this Charge, Charging Party was a member of ATU, Local 842, the exclusive bargaining representative of the Fixed Route Drivers within the meaning of 19 Del.C. §1302(j). DTC and ATU, Local 842 are parties to a collective bargaining agreement for the period December 1, 2002 through November 30, 2007.

This unfair labor practice charge was filed with the Public Employment Relations Board (“PERB”) on January 14, 2005. The Charge alleges conduct by the State in violation of 19 Del.C. §1303(2) and 19 Del.C. §1307(a)(1),(5), (7) and (8), which provide:

1303. Public Employee Rights

(2) Negotiate collectively or grieve through representatives of their own choosing.

1307. Unfair Labor Practices

(a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:

(1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.

(5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.

(7) Refuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting contract.

(8) Refuse to disclose any public record as defined by Chapter 100 of Title 29.

The Charge alleges that on August 20, 2004, Charging Party was accused of on-the-job misconduct and given the option of termination and arrest or resignation. Johnson elected to resign but subsequently changed his mind and rescinded his resignation. Johnson alleges that he was forced to resign without just cause in violation of Section 9, Step (a), the “just cause” provision in the collective bargaining agreement.

On September 9, 2004, a meeting was held (which Charging Party refers to as a “two party arbitration”) involving the grievant and both Company and Union

representatives. At this meeting Charging Party was informed that his letter retracting his resignation had been accepted and the termination process would begin. Charging Party maintains that he was denied access to the grievance procedure in violation of Section (7) of the current collective bargaining agreement and 19 Del.C. §1303(2) of the PERA.

On January 28, 2005, the State filed its Answer to Charging Party's Complaint in which it denied that Charging Party was denied access to the contractual grievance and arbitration procedure. Attached to the State's Answer was a letter from Richard V. Biggs, Case Manager with the American Arbitration Association in Philadelphia, Pennsylvania, entitled "Edward Johnson-rescinding of his resignation/termination of employment" confirming that the entitled matter is currently pending arbitration.

Under New Matter-I through IV, the State requests that the Charge be dismissed because there are no facts alleged which, even if true, would constitute the statutory violations alleged in the Complaint.

New Matter V requests that the charge be deferred to the pending arbitration before an arbitrator from the American Arbitration Association.

On February 3, 2005, Charging Party filed his Response to New Matter. With regard to the State's New Matter I-IV, Charging Party maintains that the Complaint, in fact, provides a clear and detailed statement of facts as required by PERB Rule 5.2(C)(3) sufficient to establish probable cause to believe that a violation of 19 Del.C. §1307(a)(1), (a)(5), (a)(7) and (a)(8) may have occurred.

In response to New Matter V Charging Party objects to deferral to binding grievance arbitration maintaining the State does not abide by the terms of collective

bargaining agreement and he, therefore, believes the State has no intention of processing his complaints of contractual violations to arbitration.

### **DISCUSSION**

Not every perceived injustice violates the Public Employment Relations Act. The types of conduct which constitute an unfair labor practice and violate the PERA are expressly set forth in §1307(a) and (b) of the Act. Absent conduct violating one or more of these provisions there can be no unfair labor practice.

In paragraphs 3 and 4 of his Complaint, Charging Party sets forth certain conduct which he contends in paragraph 4, is a direct violation of the collective bargaining agreement, Section 9 step (a), specifically the just cause standard for reviewing the appropriateness of assessed discipline.

In paragraph 5, of the Complaint, Charging Party references a meeting at which both DOT and Union officials were present. In paragraph 6 Charging Party alleges, inter alia, that he was denied access to the contractual grievance procedure which he contends violated Section 7 of the collective bargaining agreement. He also maintains that DOT violated Section 1303(2), of the PERA, the right of employees to “. . . grieve through representatives of their own choosing.” This is in direct contrast to his admission that Union officials were present at the meeting.

It is well established that the unfair labor practice forum is not a substitute or alternative for the resolution of contractual disputes which are subject to grievance arbitration pursuant to the collective bargaining agreement. The PERB has held:

While an unfair labor practice is statutory in origin and  
raises a question of statutory interpretation to be resolved

by the Public Employment Relations Board, an alleged contract violation is proper subject matter only for the negotiated grievance procedure. The unfair labor practice forum is not a substitute for the grievance procedure and the Public Employment Relations Board has no jurisdiction to resolve grievances through the interpretation of contract language. Brandywine Affiliate, NCCEA/DSEA/NEA v. Brandywine Bd. of Ed., Del.PERB, ULP No. 85-06-005, I PERB 131, 142-143 (1986).

There is no substantive allegation in the Complaint which, if proven, would constitute a violation of 19 Del.C. § 1307(a)(1), (a)(5), (a)(7) or (a)(8). This does not, however, deprive Charging Party of a forum in which to process his underlying complaint, the focus of which is that he was unjustly terminated. The presence or absence of “just cause,” the standard by which his termination will be judged in arbitration, raises a question of contract interpretation rather than a statutory question under the Public Employment Relations Act. Thus, the PERB is without jurisdiction to rule on the merits of Charging Party’s termination. Charging Party’s sole recourse is the contractual grievance procedure where his grievance is currently awaiting binding arbitration.

Furthermore, there is nothing in the pleadings supporting Charging Party’s alleged violation of Section 1303(2), of the Act. The Amalgamated Transit Union Local 842, is the exclusive bargaining representative for the bargaining unit of which Charging Party was a member, pursuant to 19 Del.C. §1302(j), which provides: “‘Exclusive bargaining representative’ or ‘exclusive representative’ means the employee representative which as the result of certification by the Board has the right and

responsibility to be the collective bargaining agent of all employees in that bargaining unit.”

Union officials were present at the only meeting referenced by Charging Party and it is undisputed that the Union has filed a grievance over Charging Party’s termination and demanded arbitration pursuant to the collective bargaining agreement. Thus, Charging Part’s contention that he was denied access to the grievance procedure and deprived of the right to grieve through representatives chosen by the members of the bargaining unit are without merit.

#### **PROBABLE CAUSE DETERMINATION**

Consistent with the foregoing discussion, the pleadings establish no probable cause to believe that a violation of 19 Del.C. §1303 (2) or §1307(a)(1), (a)(5), (a)(7) or (a)(8) has occurred.

WHEREFORE, the Charge is dismissed.

**IT IS SO ORDERED.**

*/s/Charles D. Long, Jr.*

**Charles D. Long, Jr.,  
Executive Director**

**Dated: February 16, 2005**